

No. 78-562

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1978

MATTHEW MADONNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1978. The petition for a writ of certiorari was filed on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether imposition of consecutive sentences for a narcotics conspiracy and a related substantive offense conflicted with the intent of Congress.
2. Whether the district court imposed sentence in an illegal manner.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to import, possess with intent to distribute, and distribute heroin, in violation of 21 U.S.C. 846, 963, and on one count of the substantive offense of distribution and possession of heroin with intent to distribute, in violation of 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(A). Petitioner's conviction was based on his role in a scheme to import 12 pounds of heroin, with an approximate street value of \$10 million, from Thailand into the United States. The conspirators concealed the heroin in false-sided suitcases and transported it into the United States by couriers (Tr. 476, 478, 701). To avoid detection, petitioner, the intended recipient of the heroin in New York, assumed a false identity and rented a car to pick up the heroin (Tr. 648-652, 861, 886). He was later arrested in the rented car containing the heroin (Tr. 886-889, 961-962, 1002, 1026-1027).

Following his conviction by the jury on both the substantive and conspiracy counts, the district court sentenced petitioner to consecutive 15-year terms of

imprisonment and fined him \$25,000 on each count. The court of appeals affirmed petitioner's conviction, and this Court denied certiorari. *United States v. Madonna*, 556 F.2d 562 (2d Cir.), cert. denied, 434 U.S. 919 (1977). Petitioner subsequently filed a motion under Fed. R. Crim. P. 35 seeking vacation of his sentence. Petitioner contended that his sentence was illegal because consecutive sentences could not be imposed for a conspiracy to violate 21 U.S.C. 841 and for the substantive offense proscribed by that provision. In addition, he argued that his sentence was illegal because the district judge relied upon inaccurate information at the sentencing hearing. Petitioner had not raised either of these claims at the time of sentencing or during his direct appeal. The district court denied petitioner's motion, and the court of appeals affirmed. *United States v. Madonna*, No. 78-1131 (2d Cir. Sept. 1, 1978) (Pet. App. 1a-4a).

ARGUMENT

1. Although conceding (Pet. 5) that there is "no constitutional impediment" to his consecutive sentences, petitioner contends that imposition of consecutive sentences for a narcotics conspiracy and the completed substantive offense conflicts with the intent of Congress. In an opinion on which we generally rely (Pet. App. 1a-4a), the Second Circuit demonstrates that this contention is without merit.

Petitioner was convicted for conspiring to import, possess, and distribute heroin and also for subsequent possession and distribution of heroin. The offense of

conspiracy required proof of different elements from the substantive offense. See *Gore v. United States*, 357 U.S. 386, 390-392 (1958); *Blockburger v. United States*, 284 U.S. 299 (1937). This Court's decisions establish "that a conspiracy poses distinct dangers quite apart from those of the substantive offense." *Iannelli v. United States*, 420 U.S. 770, 778 (1975); *Callanan v. United States*, 364 U.S. 587, 593 (1961). Accordingly, "in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end." *Iannelli v. United States*, *supra*, 420 U.S. at 777-778; see also *Curtis v. United States*, 546 F.2d 1188 (5th Cir.), cert. denied, 431 U.S. 908 (1977); *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975).

There is no indication that Congress, in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*, intended to depart from these settled principles, and no such intent should be presumed. See *Callanan v. United States*, *supra*, 364 U.S. at 594-595. The legislative history of the Act reveals a congressional intent to impose "severe criminal penalties" for serious drug offenses, and a desire to "give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. No. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 10-11 (1970). The Act's conspiracy provision, 21 U.S.C. 846, is separate from the provisions denouncing substantive offenses and contains its own authorization for imposing sentence.

In light of the Act's stated purpose to provide "more effective means for law enforcement * * * [and] drug abuse prevention and control" (H.R. Rep. No. 91-1444, *supra*, at 1), and in the absence of any expression of intent to forbid consecutive sentences for conspiracy and substantive violations, the court of appeals properly rejected petitioner's argument. See *United States v. Bommarito*, *supra*, 524 F.2d at 144; *United States v. Valot*, 481 F.2d 22, 26 (2d Cir. 1973).¹

2. Petitioner also contends that his sentence is illegal because the trial judge relied on inaccurate information (Pet. 14-21). As the court of appeals noted, however, "the record clearly refutes this claim" (Pet. App. 3a). Before imposing sentence, the district court listened at length to petitioner's counsel (Tr. 2118-2141) and afforded petitioner an opportunity to speak on his own behalf, which petitioner declined to do (Tr. 2172). The district court had

¹ The cases relied on by petitioner are not on point. In *Jeffers v. United States*, 432 U.S. 137 (1977), this Court stated that cumulative penalties should not be imposed under 21 U.S.C. 846 and 848, because "conspiracy" and "continuing criminal enterprise" involving multiple participants were substantially identical. The Court reaffirmed, however, the policy reasons that "justify separate punishment of conspiracies and underlying substantive offenses." 432 U.S. at 156-157. *United States v. Oropeza*, 564 F.2d 316, 323 (9th Cir. 1977), concluded that consecutive sentences should not be imposed for possession with intent to distribute and distribution of heroin because the offenses merged at the time of distribution. The court did not question the well established rule applied here that consecutive sentences may be imposed for conspiracy and commission of the underlying substantive offense.

previously received from petitioner a 98-page pre-sentence memorandum (Tr. 2141). In pronouncing sentence, the district court explained the basis for its decision. The court noted that petitioner's jury conviction was "appropriate and correct" (Tr. 2172), and that it was concerned about the harm that would have been caused to the people of New York if twelve pounds of heroin had been successfully distributed by petitioner. The court also pointed out that petitioner had attempted to impose on the court and jury by presenting false testimony. Finally, the court stated that a severe sentence was in order because petitioner had "control over the machinery" used to distribute a significant quantity of heroin (Tr. 2173).²

Petitioner argues that in addition to the expressed grounds for his sentence, other factors may have affected the court's decision. But petitioner offers no reason to conclude that the district court relied upon

² Petitioner argues that the record in this case does not support the inference that he had "control" over the instrumentalities of distribution (Pet. 19). But the evidence showed that he received \$10 million worth of heroin, and concealed it in an automobile as a step in the distribution process. Petitioner also argues that the district court's concern over the drug problem in New York was inappropriate (Pet. 19-20). However, the legislative history of the Act under which petitioner was convicted reflects an identical concern: "[A] leading cause of death among teenagers in the United States today in many major metropolitan areas is overdosage of heroin." H.R. Rep. No. 91-1444, *supra*, at 6. As the Second Circuit has recently pointed out, "[d]rug abuse has become epidemic, particularly in New York City which has more than half of all the drug addicts in the nation." *Carmona v. Ward*, 576 F.2d 405, 412 (1978).

other factors.³ In effect, petitioner argues that severe sentences should be presumed to have been influenced by improper considerations. But appellate courts may not set aside sentences within statutory limits simply because the sentences are severe. *Dorszynski v. United States*, 418 U.S. 424, 431 (1971); *Gore v. United States*, *supra*, 357 U.S. at 393. As this Court stated in *United States v. Grayson*, No. 76-1572 (June 26, 1978), slip op. 13, the presumption is that improper factors were not considered by the sentencing judge:

The integrity of the judges, and their fidelity to their oaths of office, necessarily provide the only, and in our view adequate, assurance against that.

As the decisions of this Court recognize, the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972). See 18 U.S.C. 3577. This case does not involve reliance on false information, *Townsend v. Burke*, 334 U.S. 736 (1948), or imposition of a severe sentence due to prior uncounseled convictions, *United States v. Tucker*, *supra*. The district

³ The district court stated that it was not relying on petitioner's prior narcotics conviction as an indication that he was a major distributor of drugs (Tr. 2118-2121). And the Court characterized petitioner's connection with a reputed narcotics customer as "irrelevant" (Tr. 2137-2138). The facts in this case were more than sufficient to show petitioner's role in the drug distribution process.

court explained the reasons for petitioner's sentence, and those reasons were valid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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